THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

FIBER TECHNOLOGIES NETWORKS, L.L.C. 140 Allens Creek Road Rochester, NY 14618, Complainant, v. TOWN OF SHREWSBURY ELECTRIC LIGHT PLANT 100 Maple Avenue Shrewsbury, MA 01545-5398, Respondents.	)	D.T.E. 01-70

**COMMENTS OF FIBER TECHNOLOGIES NETWORKS, L.L.C.
ON THE EFFECT OF ITS WHOLESALE TARIFF FILING**

In its Procedural Memorandum of December 15, 2003, the Department directed the parties to comment on the impact of the Massachusetts D.T.E. Tariff No. 3 ("M.D.T.E. 3") that Fiber Technologies Networks, L.L.C. ("Fibertech") filed on November 10, 2003. Fibertech filed this tariff pursuant to the Department's *Wholesale Tariff Order*,[1] and the Department permitted it to go into effect December 10, 2003. The Department now asks for comment on whether M.D.T.E. 3 affects material questions of law or fact on the motion for reconsideration and clarification pending in this case since January 16, 2003.

This tariff filing does not alter fundamental issues presented by Fibertech's long-pending complaint and motion for reconsideration. First, the Department's jarring ruling in the

[1] *Clarification of Wholesale Tariffing Requirements* (Aug. 12, 2003).

Interlocutory Order[2] that a telecommunications provider must obtain local grants of location before it can even enter into a pole attachment agreement with a utility (much less apply for individual pole attachment licenses) applies regardless of the nature of the services offered. Second, while Fibertech's tariff offerings make it even more clear that as a telecommunications provider, it is a "company incorporated for the transmission of intelligence" within the meaning of G.L. c. 166, § 21 and therefore "a licensee" within the meaning of G.L. c. 166, § 25A, this is the case whether the services offered are dark fiber, lit fiber, or something else. Nonetheless, the Department's *Wholesale Tariff Order* changes the significance that the Department accorded to a tariff in the *Interlocutory Order,* with the result that M.D.T.E. 3 establishes conclusively that Fibertech is a "company incorporated for the transmission of intelligence." Accordingly, more than three years after Shrewsbury's Electric Light Plant ("SELP") refused to give Fibertech access to poles, it is time to give force to the utility's obligation to provide nondiscriminatory access at long last.

BACKGROUND

In its Statement of Business Operations, Fibertech stated that it "will develop and lease high capacity dark fiber for lease by Government/Education, business and various communication carriers." Fibertech went on to state that "[a]s market conditions and economics dictate, [it] intends to supplement these offerings with additional services…." Fibertech's M.D.T.E. 3 is such a supplemental offering; its service description (Sections 5.2 and 5.3) lists point-to-point wholesale services that include DS-3 and DS-3 multiples, and OC-3, OC-12, OC-48 and OC-192 SONET services – in other words, "lit" fiber services. A customer is defined in

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[2] *Interlocutory Order on Motion of Fiber Technologies Networks for Summary Judgment And in Appeals of Fiber Technologies Networks from Hearing Officer Rulings on Motions to Compel Responses to Information Requests* (Dec. 24, 2002)("*Interlocutory Order*").

M.D.T.E. 3 as a "telecommunications carrier or internet service provider….". In addition, Fibertech is in the process of preparing a tariff for non-wholesale (end user) dedicated services including both "lit" and "dark" fiber services.

M.D.T.E. 3 was filed in response to the Department's directive that carriers file tariffs for all wholesale telecommunications services offered on a common carriage basis within the Commonwealth of Massachusetts. *Wholesale Tariff Order* at 8. At the same time, the DTE directed carriers to withdraw any tariffs for services offered on a private carriage basis, and clarified the significance it attributes to a tariff filing: all services to be offered pursuant to a tariff will be presumed to offered as common carriage, and a tariff will be rejected unless carriers indicate that the offering in the tariff "is either currently available, available within a specified time frame, or available subject to specific regulatory approvals." *Id*. at 9.

The Procedural Memorandum in this case specifically asks the parties to comment on the impact of Fibertech's M.D.T.E. 3 pursuant to the *Wholesale Tariff Order* on two issues that the Department has deemed to be disputed issues of fact: "(1) whether Fibertech is a 'licensee,' and (2) whether Fibertech is 'incorporated for the transmission of intelligence."

ARGUMENT

I. The Tariff Filing Does Not Affect The Fundamental Point That A Grant of Location Pursuant to G.L. c. 166, §22 Cannot Be A Condition Precedent to Being A "Licensee" within The Meaning of G.L. c. 166, §25A.

General Laws c.166, § 25A defines a "licensee" as a person "authorized to construct lines or cable upon, along, under and across the public ways."

In its *Interlocutory Order*, the Department correctly read this language as referring to a "company incorporated for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise" within the meaning of G.L. c.166, § 21. The Department

also correctly characterized the latter language as "describ[ing] the classes of persons who may construct lines across public ways" and "address[ing] who may construct lines across the public ways and under what conditions." *Id.* at 16, 20. Since Department thereby established under G.L. c. 166, § 21 that a "company incorporated for the transmission of intelligence" may construct lines in public ways, it could have – and should have – ended the analysis there by holding that such a person is a "licensee" within the meaning of G.L. c. 166, § 25A. Instead, the Department arrived at the conclusion that state authority under G.L. c. 166, § 21 is not enough be deemed a "licensee" and that a "company incorporated for the transmission of intelligence" also must have local authority under G.L. c. 166, § 22.

For the reasons expressed in Fibertech's Motion for Reconsideration and Clarification, this ruling is at odds with the nature of pole attachment agreements and well-established industry practice and procedure that address licenses for individual pole attachments or conduits at specific locations only ***after*** the agreements that spell out the procedures for obtaining licenses. Notwithstanding SELP's contention that these facts were not presented by Fibertech's motion, the Department in its *Interlocutory Order* stated that on a motion for summary decision it takes into account, among other things, pre-filed testimony and responses to discovery and it was able to note on this basis that

> Fibertech has executed aerial and conduit license agreements with New England Telephone and Telegraph Company ("Verizon"), Western Massachusetts Electric Company ("WMECo"), and Massachusetts Electric Company ("MECo") and with the municipal light plants of Templeton and Holden, Massachusetts, jointly with Verizon. These aerial and conduit agreements set forth rates terms and conditions for obtaining attachment to poles and conduits owned or controlled by Verizon, WMECo, or MECo, or by the towns of Templeton or Holden, jointly with Verizon.

Interlocutory Order at 4, 6.[3] In turn, we respectfully submit, the Department neglected to bring its expertise to bear on the nature of pole attachment agreements. In the Verizon 271 proceeding, the DTE reviewed the history of pole attachments in Massachusetts examined in detail Verizon's agreements, terms and conditions, and processing of applications.[4] There, it recognized the distinction between license agreements and the access requests and processing of applications that follow under such agreements. The latter process includes "providing access to maps, records and other information; assigning available space; and coordinating any necessary field surveys."[5] Indeed, the language in the *Interlocutory Order* above reflects understanding that pole attachment agreements establish terms and conditions for "obtaining attachment," rather than that such agreements themselves confer licenses for attachment.[6]

SELP's opposition to Fibertech's motion for reconsideration appears to contain a highly significant concession that shows G.L. c. 166, § 22 is irrelevant to whether a company "incorporated for the transmission of intelligence" is a "licensee" within the meaning of G.L. c. 166, § 25A. SELP states that, where grants of location have already been issued for pole locations, Fibertech need not seek pole locations; instead, it need only seek permission to place wires on the poles. "It is the pole owner that petitions the Board of selectmen for increase in the number of wires on its poles" and, where SELP is a municipal light plant, such permission is not

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[3] In its Opposition to Fibertech's Motion for Reconsideration and Clarification, SELP vainly suggests that Fibertech has simply stated what "two other utilities In Massachusetts" have done in Fibertech's case. Not only does this misstate the number of utility agreements, it overlooks that these are major utilities covering most of the Commonwealth. The Department is aware that these utilities offer pole attachment agreements on standard terms and conditions. *See In The Matter of Application of Verizon New England, Inc. et al. for Authorization under Section 271 of the Telecommunications of 1996 to Provide In-Region Inter-LATA Services in Massachusetts*¸ Evaluation of the Massachusetts Department of Telecommunications and Energy at 224 (Oct. 16, 2000)("*Department 271 Evaluation*").

[4] *Id*. at 224-239.

[5] *Id*. at 226.

[6] Moreover, the Department has also had before it the case involving claims by WMECo, Verizon, and MECo that Fibertech, although it had pole attachment agreements with each of these utilities, failed to obtain licenses from them for specific attachments on individual pole. D.T.E. 03-56.

required. SELP Opposition at 12 & n. 10. By this analysis, SELP seems to suggest ***no further grants of location are necessary*** for Fibertech to attach to SELP's poles.

It is beyond dispute that being eligible to enter into a licensing agreement is distinct from obtaining pole attachment licenses. And, regardless of when municipal grants of location are required in relation to pole attachment licenses, it is premature to require such grants before an agreement is reached enabling the process of "providing access to maps, records and other information; assigning available space; and coordinating any necessary field surveys" necessary to establish where grants of location are needed. The Department was mistaken in equating obtaining an agreement with obtaining attachments and is inconsistent with its own analysis of Verizon's agreements.

These issues subsist notwithstanding Fibertech's tariff filing. The Department's perceived linkage between obtaining grants of location under G.L. c 166, § 22 and becoming a "licensee" under G.L. c. 166, § 25A is an obstacle to obtaining a pole attachment agreement regardless of the services Fibertech offers or when they are offered – dark fiber, lit fiber, or otherwise. This warrants reconsideration "for the orderly administration of this proceeding."[7] Otherwise, even if it ultimately ruled in Fibertech's favor on the "incorporated for the transmission of intelligence" and "licensee" issues, the Department would be unable to grant complete relief because it "cannot rule on the ultimate question of whether Fibertech in entitled to access to attachments in Shrewsbury until the Board of Selectmen acts on Fibertech's petition for a grant of location." *Interlocutory Order* at 24. In this light, the Department would

[7] The Department has recognized the rule of administration as an exception to its ordinary rule against reconsideration of interlocutory decisions. *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*, D.T.E. 01-20, *Interlocutory Order On At&T's Motion For Relief, Motions To Compel Verizon Responses To AT&T Information Requests, And Conditional Motion To Strike Verizon's Recurring Cost Model*, D.T.E. 01-20 (Oct.18, 2001).

face the same motion for reconsideration on a final order, and orderly administration makes it appropriate to correct it now rather than leave it as the law of the case for later correction. Meanwhile, the Department's interpretation has present effect - the Town of Shrewsbury has yet to act on Fibertech's applications for grants of location, and other utilities have asserted Fibertech lacks standing to obtain pole attachments.[8] "Where good cause appears, not contrary to statute, the Commission and any presiding officer may permit deviation from 220 C.M.R. 1.00." 220 C.M.R. § 1.01. There is good cause for reconsideration in this case.

II. Fibertech's Tariff Filing Clarifies That Any Issues of Fact Concerning Fibertech's Services Are Not Genuine And Material Issues for Purposes of Summary Decision.

In its *Interlocutory Order*, the Department found that dark fiber is "a facility used in the transmission of intelligence" and a "telecommunications service." *Interlocutory Order* at 28, 27 n. 25. The Department nevertheless perceived an issue of fact as to whether Fibertech is a "company incorporated for the transmission of intelligence …" Because the Department rejected theories on which SELP refused to provide attachments[9] and did not articulate how any of the other speculative theories SELP offered up to justify its action would affect the outcome, Fibertech's motion for clarification asks the Department to clarify just what issues are both genuine and material.

Fibertech's tariff filing and the *Wholesale Tariff Order* on which it is based make it clearer that SELP's purported factual disputes lead nowhere. Regardless of the genuineness or

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[8] *See Answer of Verizon Massachusetts, Verizon Massachusetts' Motion to Dismiss, and Western Massachusetts' Electric Company's Motion to Dismiss*, D.T.E. 03-56 (May 28, 2003); *see also Massachusetts' Electric Company's Answer and Motion to Dismiss*, D.T.E. 03-56 (June 13, 2003).

[9] SELP variously contended that, as a dark fiber provider, Fibertech was not a CLEC providing retail services or a common carrier, and that providing dark fiber without electronics is not the "transmission" of intelligence. The Department rejected SELP's common carrier argument by finding that "the companies described G.L. c. 166, § 21 are not limited to companies that provide services 'rendered for public use' as in G.L. c. 159, § 12." Interlocutory Order at 20. It rejected SELP's dark fiber argument, holding that information as to whether Fibertech's fiber is lit is not relevant. *Id.* at 45. And, if there was any vitality left to SELP's argument the Fibertech must provide service to end-users, the *Wholesale Tariff Order* puts that to rest.

materiality of any factual disputes framed by the *Interlocutory Order*, the tariff filing obviates any such disputes.

First, the *Wholesale Tariff Order* changes the significance that the *Interlocutory Order* ascribed to Fibertech's tariffs. In the latter order, the Department found that filing of registration and an initial tariff "does not involve a finding that the company is engaged currently in the transmission of intelligence" because of pro forma tariff filings of tariffs by companies that "never do become operational." *Interlocutory Order* at 18. The *Wholesale Tariff Order*, on the other hand, does involve such a finding. It requires that tariff filings indicate that the tariffed service "is either currently available, available within a specified time, or available subject to specific regulatory approvals" and provides that the Department will reject tariffs that do not meet this requirement. *Wholesale Tariff Order* at 9. Department approval of M.D.T.E. 3 therefore involves a finding that the tariffed services are or will be available to the extent required by the *Wholesale Tariff Order*. In this light, M.D.T.E. 3 is the functional equivalent of having "formulated a definite business plan." *Cf. Interlocutory Order* at 43.

Second, in the *Wholesale Tariff Order*, the Department defined the services subject to tariffs as "allowing customers to ***transmit intelligence*** of their own design and choosing." *Wholesale Tariff Order* at 8. Thus, the Department's approval indicates that the services that are or will be available involve the transmission of intelligence. Anything left of SELP's contention that a wholesale carrier is not a common carrier under Massachusetts law because "public use" means end-users is destroyed by the Department's clarification that wholesale carriers can be "common carriers" subject to G.L. c. 159, § 19. In turn, carriers subject to the latter provision are by definition companies that render services that include "[t]he transmission of intelligence

within the commonwealth" subject to G.L. c. 159 § 12. There is no basis for distinguishing the phrase "transmission of intelligence" in G.L. c. 159 § 12 and as it is used in G.L. c. 166, § 21.

Third, the services that are or will be available under Fibertech's M.D.T.E. 3 are common forms of wholesale "lit" fiber. SELP has never contended that lit fiber is not the "transmission of intelligence" for purposes of G.L. c 166, § 21. To the contrary, SELP's argument was that dark fiber does not involve "transmission" because it lacks the electronics needed to send optical signals through fibers.[10] The corollary is that lit fiber services involve the transmission of intelligence. M.D.T.E. 3 reflects that Fibertech now offers these electronics. Whatever residual issues of fact there might be with respect to Fibertech's dark fiber, its offering of lit fiber makes Fibertech just like many other carriers in Massachusetts, and makes its service "transmission of intelligence.".

That Fibertech is situated similarly to many other carriers underscores the dangerous precedent of an extensive inquiry into Fibertech's business plans in order to establish that it is a "licensee" within the meaning of G.L. c. 166, § 25A. If Fibertech can be subjected to such inquiry, so can any new entrant. If there is some question whether the services offered in M.D.T.E. 3 are the "transmission of intelligence," it is questionable for any carrier. And if the Department deems it necessary to examine the identity of customers, customer agreements, and the reflected business plans of both the carrier and its customers to determine whether a carrier qualifies as a "licensee," what is to stop a utility from doing the same when any carrier asks to enter into a pole attachment or conduit agreement? One can visualize the negotiations that would ensue:

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[10] *See Responses of Shrewsbury's Electric Light Plant, Responses 28, 34 and additional Responses 2, 4, 6 and 7*, D.T.E. 01-70 (September 17, 2001); *see also Shrewsbury's Electric Light Plant's Response to Fiber Technologies Networks, L.L.C.'s Motion for Summary Judgment;* D.T.E. 01-70 (March 28, 2002).

> Hello, we're Level 3 [MCI, RCN, or anyone else]. We're building a telecommunications network to provide wholesale services, and we're interested in obtaining an agreement for pole and conduit licenses.
>
> That's nice. But we don't enter into such agreements unless you are a "licensee." And to establish whether you are a licensee, we need to know what kind of services you provide.
>
> We provide DS3 and SONET ring services for carriers and ISPs.
>
> How do we know that?
>
> It says so in our Statement of Business Operations and tariff.
>
> That's "uncorroborated."[11] You'll have to show us your customer agreements.
>
> Well, even if we were ready to show you customer agreements, we can't because we are a new entrant and customers won't sign up until we can assure them that we can provide network.
>
> You have to prove you have "formulated a definite business plan."[12] Show us your business plan.

This script is a recipe for mischief by incumbent utilities seeking to deter competitive entry, and thus antithetical to the purpose of pole attachment regulation. Disclosure of such information is precisely the kind of unreasonable condition on pole attachments that the FCC has prevented, holding that an attaching cable operator "is under no obligation to [a utility] to disclose any information regarding the lease of its capacity to third parties" and that "disclosure of the names of [the operator's] nonvideo transmission customers" is unjust and unreasonable. *Marcus Cable Associates, L.P.*, FCC P.A. No. 96-002, ¶¶ 22, 24 (released July 21, 1997). While opening the door to such an anticompetitive inquiry is imprudent in any event, Fibertech's filing of M.D.T.E. 3 obviates the basis for it.

The Department should recall that this dispute began with SELP saying it would allow Fibertech on its poles — provided (a) that Fibertech agreed not to compete with SELP in

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[11] *Interlocutory Order* at 24 n. 22.
[12] *Id*. at 43.

Shrewsbury[13] and (b) that Fibertech agreed to provide SELP with twelve fiber strands anywhere on its network at half price, thereby allowing SELP to compete as a wholesale carrier against Fibertech on Fibertech's own network.[14/] Three years after refusing this explicit restraint of trade and leveraging of SELP's monopoly power, Fibertech still has been unable to gain entry into Shrewsbury. The Department should not enable this kind of manifestly anticompetitive behavior by SELP or any other incumbent utilities in Massachusetts.

As it stands, the *Interlocutory Order*'s interpretation of G.L. c 166 § 21, 22, and 25A presents the basis for an action under Section 253 of the Telecommunications Act as a "state statute or regulation, or other State ... legal requirement" that has "the effect of prohibiting the entry of an entity to provide interstate or intrastate telecommunications service." 47 U.S.C. § 253 (a). By requiring grants of location before a new entrant can even establish the terms and conditions on which it can seek pole attachments, the ruling puts the new entrant in a Catch 22. It cannot seek locations without knowing where to construct, it cannot plan where to construct without the field surveys and make-ready estimates that follow the signing of a pole attachment agreement, but it cannot get an agreement without grants of locations. In short, it is stymied, as Fibertech has been in Shrewsbury for three years. Further, the decision gives the utility a license to inquire about customers and business plans under the guise of determining whether the new entrant is "incorporated for the transmission of intelligence." Notwithstanding the Department's assurance "that we are not establishing a general requirement that pole attachment applicants must first seek a finding from the Department that they are in the business of transmission of intelligence before they may be considered to be qualified to apply

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13 *Id.* at 7 (no interconnection allowed in Shrewsbury "except as SELP may allow for its own benefit").

14 *Id.* (SELP's right lease up to twelve fibers at a 50% discount "to a point anywhere on Fibertech's system").

for municipal grants of location,"[15] the *Interlocutory Order* invites municipalities to second-guess this question.

We can only presume that these consequences are the result of mistake or inadvertence. Going back to D.P.U. 1731 (1985), the Department has too strong a record of fostering competition to intend such effects, and it adopted and amended its pole attachment regulation consistent with this record to carry out the mandate of Section 224 of the Telecommunications and reduce barriers to entry. Consistent with this record, the Department should correct its inadvertent error in the *Interlocutory Order*. To avoid such barriers to that entry, the Department should tie the meaning of "licensee" under G.L. c. 166, § 25A to a bright line standard. Fibertech's M.D.T.E. 3 filing affords a basis for settling such a standard and a partial basis for correcting the *Interlocutory Order*.

Respectfully submitted,

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[15] *Id.* at 25 n. 23.

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